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Nos. 03-637, 03-701 & 03-929

Supreme Court, U.S.
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In The
Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, et al., *Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *Respondent.*

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

JOHN A. RAPANOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Fourth And Sixth Circuits

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, FLORIDA STORMWATER ASSOCIATION, FLORIDA ASSOCIATION OF SPECIAL DISTRICTS, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CITY OF CLEWISTON IN SUPPORT OF THE PETITION FOR WRITS OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals are deeply divided over the meaning of "navigable waters" and the principles enunciated in *Solid Waste Agency of Northern Cook County* v. *United States Corps of Engineers*, 53 U.S. 159 (2001). What constitutes a "navigable water" determines the scope of federal regulatory jurisdiction and, thus, delineates federal and state roles in protection of the nation's waters under the Clean Water Act, the Oil Pollution Act and other significant federal legislation. *Amici curiae* – various state agencies, local governments and others involved in water resource management – believe it is of critical national importance for the Court to clarify which principles properly define what is and is not a "navigable water" through the following question presented:

Whether federal jurisdiction over "navigable waters" extends to all waters that have any hydrologic connection with a navigable-in-fact water body, regardless of proximity and no matter how indirect, intermittent or ephemeral their connections may be?

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INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] – National Association of Flood and Stormwater Management Agencies, Florida Association of Special Districts, Florida Stormwater Association, South Florida Water Management District, and City of Clewiston – submit this brief to encourage granting the Petitions for Writs of Certiorari in *United States* v. *Deaton*, Case No. 03-701; *Newdunn* v. *United States Army Corps of Engineeers*, Case No. 03-637; and *Rapanos* v. *United States*, Case No. 03-929.

Amici include state agencies, local governments and a consortia of cities and local water management groups all with a strong interest in the clear and consistent interpretation of "navigable waters" – the term of art used to establish the geographic scope of federal jurisdiction under several significant federal regulatory programs, including the Clean Water Act and the Oil Protection Act. *Amici* are concerned with the reasonable and uniform application of those programs, which create distinct regulatory roles for the federal, state and local governments in the preservation and protection of all waters.

NAFSMA, established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's

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[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which control the movement of waters within their jurisdictions.

The Florida Stormwater Association (FSA) is a non-profit organization with almost 200 member cities and counties, water management districts, engineering firms, and others interested in surface water quality. FSA is an active participant in the development of stormwater management policy and works to create solutions to stormwater management problems that can be implemented by local governments. It provides training and education, information sharing and advocacy relating to water issues.

The South Florida Water Management District (SFWMD) is one of five water management districts with stewardship over Florida's public water resources. §§ 373.069 & 373.016, Fla. Stat. The District establishes and implements the State's water policies from Orlando to Key West. §§ 373.069(2)(e), 373.073 & 373.016, Fla. Stat. It operates a comprehensive water management system of levees, canals and flow diversion facilities designed to control and allocate the waters throughout the watersheds within its jurisdiction for flood control, water supply, and environmental purposes.

The City of Clewiston is a municipal corporation located in South Florida that has approximately 6,500 residents.

The *Amici,* their members and similar agencies nationwide are responsible for innumerable public works which today manage surface waters to provide flood control, water supply and protection for the natural systems. These public works are often subject to a variety of federal programs, including construction permits under the Corps § 404 dredge and fill program; Municipal Separate Storm Sewer Systems under § 402(p); and other National Pollutant Discharge Elimination System permits under § 402. Whether these federal regulatory programs apply to any given activity or facility depends, in large part, upon whether the waters involved are characterized as "navigable" or not. Congress left the remainder of the task of preventing water pollution to the States, with federal guidance, assistance, and oversight. See THE CLEAN WATER HANDBOOK 191-220 (M. Ryan ed. 2003).

Congress took seriously this division of responsibility between the federal government and the States, reflecting its intent to maintain States' traditional powers over water allocation and water and land use. See 33 U.S.C. § 1251(b) & (g). As this Court recently observed, the Clean Water Act must be interpreted with Congress's intent to maintain the federal-state balance of powers firmly in mind. *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 166-167, 173 (2001) (*SWANCC*).

Amici are also concerned that expanding federal CWA requirements to many areas far outside traditional navigable waters would mandate costly, time-consuming, and

burdensome bureaucratic proceedings, exposing water agencies to huge penalties for past violations, and interfering with the States' own highly developed pollution programs – consequences never intended by Congress.

For these and other reasons explained below, *Amici* urge the Court to clarify the principles enunciated in *SWANCC* and the proper scope of "navigable waters" while maintaining the proper federal and state balance in our partnership to restore and protect all of the nation's waters.

ARGUMENT

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE REACH OF "NAVIGABLE WATERS" AND SCOPE OF FEDERAL REGULATIONS BASED THEREON.

The term "navigable waters" has been used by Congress for well over a century to define the reach of federal jurisdiction under several critical regulatory programs. Today it appears 215 times in the United States Code and 735 more times in the Code of Federal Regulations. Nonetheless, a definitive reliable test to determine what constitutes "navigable waters" remains strikingly elusive. The principles laid down by this Court in *SWANCC* to guide such determinations have instead become the subject of deep conflict among courts of appeals.

In *SWANCC*, the Court interpreted "navigable waters" to include waters with a "significant nexus" to a navigable-in-fact water body. 531 U.S. 159 (2001). Rejecting the United State's position, the Court explained that "In order to rule for [the government] . . . we would have to hold that

the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water." Ibid. at 168 (emphasis original). Importantly for *Amici*, the Court recognized that "permitting [the Corps] to claim federal jurisdiction over ponds and mudflats would result in a significant impingement of the States' traditional and primary power over land and water use." Ibid. at 174.

Since *SWANCC*, the courts continue to differ over what constitutes a "nexus" significant enough to transfer jurisdiction over water use from state to federal regulators. Some courts apply a narrow test that requires waters to be "adjacent" to open waters to be considered navigable, while others accept *any* hydrologic connection as sufficient.

In the instant cases, the Fourth and Sixth Circuits found a "significant nexus" in slight, indirect, intermittent and arguably hypothetical hydrologic connections. For example, in *Deaton* the Fourth Circuit found federal jurisdiction over a roadside ditch located eight miles from a navigable-in-fact water. Similarly, the Fourth Circuit in *Newdunn* upheld the exercise of federal jurisdiction over waters found to be "remote" from navigable waters to which they were connected only by intermittent surface waters. In *Rapanos*, the Sixth Circuit again found jurisdiction over wetlands that were admittedly not themselves adjacent to navigable waters. Thus, these cases involve lands located significant distances from any traditionally navigable waters and with the most tenuous of hydrologic connections to them.

The Fifth Circuit has squarely rejected the Fourth and Sixth Circuit's proposition in these cases that any hydrologic connection creates a "significant nexus" to

navigable waters. In *Rice* v. *Harken Exploration Co.*, the court of appeals interpreted *SWANCC* to mean that "a body of water is [navigable] only if it is actually navigable or is adjacent to an open body of navigable water." 250 F.3d 264, 270 (5th Cir. 2001). More recently and pointedly, in *In re*: *Needham*, ___ F.3d ___, 57 ERC 1673 (5th Cir. 2003), the Fifth Circuit flatly stated that the Fourth and Sixth Circuit's view is "unsustainable under *SWANCC*," solidifying its position that a "significant nexus" requires not merely a remote hydrologic connection, but also some reasonable proximity. This conflict, expressly noted in *Needham*, is clear, deep and irreconcilable.

II. IT IS OF CRITICAL NATIONAL IMPORTANCE TO STATE AND LOCAL WATER MANAGERS FOR THIS COURT TO RESOLVE THE CONFLICT BELOW AND CLARIFY THE MEANING OF "NAVIGABLE WATERS."

The inter-circuit conflict over the question presented should be immediately resolved by this Court for several reasons.

1. The Court cannot expect the federal agencies to provide sufficient guidance to overcome this split among the courts of appeals. To the contrary, EPA and the Corps recently abandoned previously announced plans to address CWA jurisdiction and the principles enunciated in *SWANCC* through rulemaking, plainly leaving this conflict to be resolved by the Court. EPA, APPELLATE DECISIONS MAY RETURN WATER ACT BATTLE TO HIGH COURT, INSIDE EPA Vol. 24, No. 51 (Dec. 19, 2003). Continued percolation of this issue will simply add to the confusion and burdens described below.

2. Whatever the result, the *Amici* deserve clarity and uniformity in how the federal laws are applied. Water managers and local governments should not be subjected to different federal permitting depending upon which judicial circuit they operate. As it stands, the rights of *amici* improperly vary from circuit to circuit and remain increasingly uncertain in those circuits that have not decisively addressed the question presented here.

3. The almost limitless interpretation of "navigable waters" adopted in *Deaton*, *Newdunn* and *Rapanos* most certainly shifts the federal-state balance struck in the Clean Water Act. Virtually all water management and drainage districts, counties and cities traditionally use canals, ditches, culverts, gutters and other drainage works to manage surface waters. Where these are all considered "navigable waters" simply because waters from them *may* "eventually flow" to a water body that is actually navigable-in-fact, any distinction intended by the term "navigable" is lost.

As the scope of "navigable waters" expands, several Clean Water Act permitting programs become even more extensively applied to traditionally local water management activities. As the Deatons correctly point out, the present conflict obscures and confuses what is national and what is local. *Deaton* Br. 22. Congress should not lightly be assumed to have intended such a result. In fact, the Act should not be read so broadly absent a clear statement that Congress intended to so transform the balance of federal and state rights and responsibilities.

4. On a practical level, significant regulatory burdens, costs and delays will be added to important public works with the expansion of federal permitting. Where there is

no evidence of the waters actually reaching or harming any navigable water, these burdens are added for no identifiable environmental benefit. Moreover, programs such as the National Pollutant Discharge Elimination System lack the flexibility necessary to accommodate local concerns and will supplant local decision making and programs designed to allow systemic planning. State and local government resources remain increasingly hard pressed to handle growing urban, agricultural and natural systems needs. Additional burdens should neither be ignored nor so easily extended.

5. Finally, confusion among the courts of appeals creates heightened problems where as here, the federal regulatory scheme brings with it not only fines but the potential for criminal penalties including jail. See *Rapanos*. Given the conflicts amongst the courts of appeals, *Amici* increasingly risk unanticipated and unpredictable liabilities.

CONCLUSION

There are few issues more critical to state and local water managers, including counties, municipalities, flood control and drainage districts, and stormwater utilities than the need to clearly understand the scope and reach of the many federal regulatory programs under which they operate. The conflict among the Circuits has created confusion and uncertainty and should now be resolved by this Court.

The *Amici* therefore urge this Court to accept the petitions and resolve the question presented.

Respectfully submitted,

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